

MEMORANDUM

TO: Chancellor Mark Hagerott; Dr. Joshua Wynne
FROM: Eric D. Olson
DATE: October 25, 2021
CC: Institutional CEOs, Smart Restart Task Force
RE: Federal Contractor Vaccine Mandate

You asked me to review the September 24, 2021 “COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors” issued by the Safer Federal Workforce Task Force (the “Federal Guidance”) pursuant to authority granted by the Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors signed by President Biden on September 9, 2021 (the “Executive Order”) in order to provide guidance on how that guidance may affect the institutions of the North Dakota University System. In crafting the below guidance, I have reviewed the Executive Order, Federal Guidance, related analysis prepared by industry groups such as the American Council on Education and the National Association of College and University Attorneys, and related statutes, regulations, and court decisions. As has been the case throughout the COVID-19 pandemic, this guidance is based on the information available as of the date of its issuance, though circumstances continue to change rapidly; this guidance does not address any potential subsequent amendments or revisions to the underlying federal requirements. Nor does it address the possible outcome of pending or potential litigation relating to the Federal Guidance. This document constitutes advice to assist NDUS institutions in complying with the new federal requirements, but should not be read as establishing a standard of care or a required course of action; institutions should consult with their assigned attorneys to determine the best course for their circumstances.

As in the past, I have structured this guidance in the form of a frequently-asked-questions document. As always, this guidance is provided in my capacity as general counsel for the North Dakota University System and State Board of Higher Education. Please do not consider any advice or opinion in this memorandum as constituting personal legal advice; for personal legal advice, please consult a private attorney.

1. What does the Federal Guidance require?

In short, the Federal Guidance requires federal contractors and subcontractors with a covered contract to conform to the following workplace safety protocols:

1. COVID-19 vaccination of covered contractor employees, except where an employee is legally entitled to an exemption;
2. Compliance by individuals, including covered contractor employees, non-covered contractor employees, and visitors, with masking and physical distancing requirements while in covered contractor workplaces; and
3. Designation by covered contractors of a person or person to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

Each of these protocols has multiple parts and is subject to broad definitions and clarifications within the Federal Guidance, which will be discussed at further length below.

2. What is the deadline to comply with the mandate?

The Federal Guidance provides that compliance with its requirements must be reached on or before December 8, 2021. Because this deadline requires full vaccination, the deadline for covered contractor employees to receive the final dose of a vaccine¹ would be November 24, 2021. It is likely that the federal government or prime contractor (for subcontracts) will require the NDUS institutions involved to certify compliance with the guidance.

3. Are NDUS institutions “covered contractors” under the Executive Order and Federal Guidance?

To the extent that NDUS institutions are either prime contractors or subcontractors on procured contracts with the federal government, the NDUS institution will likely be considered a covered contractor. NDUS institutions should promptly consult their legal advisors or federal contract administrator to determine if any contracts on which they are prime contractors will be covered by the mandate. If an NDUS institution is a covered contractor due to their status on a subcontract, the institution will likely be informed by the prime contractor of their status as a covered contractor and the deadline to comply with the mandate.

4. What is a “covered contract,” and what is and isn’t included in that definition?

The Federal Guidance makes clear that functionally all contracts or contract-like instruments² which are covered by competitive or sole-source procurement under federal law. This definition is not limited to contracts which are formally issued after a procurement subject to the Federal Acquisition Regulation (or FAR),³ but instead broadly covers bilateral or multilateral instruments (including those for services), along with awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; exercised contract options; and bilateral contract modifications.

In essence, if an agreement with the federal government is legally binding and enforceable under federal law, the contract is covered by the guidance.

¹ The second dose of Pfizer or Moderna vaccines, or the first dose of the Johnson & Johnson/Janssen vaccine.

² The term “contract-like instruments” appears to specifically reference documents which are not called or formally designated as contracts but are structured and executed in the same manner as contracts. The guidance refers to a different regulation, which defines “contract or contract-like instrument” as “an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.” *See* 86 Fed. Reg. 38816, 38887 (Jul. 22, 2021).

³ *See* 48 C.F.R. ch. 1.

However, there are several specific exclusions in the Executive Order which may affect NDUS institutions. These include grants; contracts or contract-like instruments with Indian Tribes under the Indian Self-Determination and Education Assistance Act, contracts or subcontracts whose value does not exceed the simplified acquisition threshold (generally \$250,000, but please consult with your legal counsel to determine if a specific contract does or does not meet this threshold); employees who perform their work on a covered contract outside the United States; and subcontracts for so-called off-the-rack products.

5. Are Program Participation Agreements (PPAs) covered by the guidance? What about the EPSCOR and IMBRE cooperative agreements?

At this point, it does not appear that the guidance, by its terms, covers the PPAs institutions sign with the Department of Education for students to receive access to federal student aid funding, due to the limitations placed present in the Executive Order. However, there remains a great deal of uncertainty as to the durability of this determination, as the Federal Guidance “strongly encourage[s] agencies] to incorporate a clause requiring compliance with this guidance into contracts that are not covered or directly addressed by the order.” The American Council on Education has sought clarification on whether PPAs are considered “covered contracts” under the meaning of the Executive Order, so hopefully additional clarification will be forthcoming.⁴

Based on the definitions included in the Federal Guidance and Executive Order, it appears that the NSF EPSCoR, NASA EPSCoR, and NIH IMBRE cooperative agreements will be considered “covered contracts or contract-like instruments.” These programs are procured agreements which place certain requirements on the state in exchange for the provision of jurisdictional funding for research, research capacity, and other programs which fall under the auspices of the programs. The American Council on Education agrees that cooperative agreements, provider agreements, service agreements, licenses, and permits are included in the broad definition of “contract or contract-like instrument.”⁵

6. At what point is a contract considered “covered”?

The Executive Order and guidance provide that any new contract or contract-like instrument, renewing or extending contract or contract-like instrument, and exercise of an option on an existing contract or contract-like instrument executed on or after October 15, 2021, shall include a clause to the effect that the contractor shall comply with all COVID-19-related guidance, which would include the federal guidance discussed in this memorandum.

⁴ American Council on Education, “While Biden’s Vaccine Mandate Will Impact Colleges and Universities, Details Remain Unclear” (Sept. 20, 2021), *available at* <https://www.acenet.edu/News-Room/Pages/Biden-Vaccine-Mandate-Impact-on-Higher-Ed.aspx>.

⁵ American Council on Education, “Issue Brief: Assessing the Impact of COVID-19 Federal Contractor Requirements on Colleges and Universities” (Oct. 4, 2021), *available at* <https://www.acenet.edu/News-Room/Pages/ACE-Issue-Brief-on-Biden-Vaccine-Mandate.aspx>. Additionally, the State EPSCoR Office has now received notice that the Federal Guidance will apply to such cooperative agreements.

As a result, most existing contracts will not immediately be subject to the mandate. However, the Executive Order provides, at Section 6(c), that to the extent possible, the contracting agencies shall carry through the new clause as permitted by law. While specific circumstances under which a federal agency may try to carry through the new clause are outside the scope of this guidance, such circumstances could include terms and conditions for expense reimbursements, subcontractor authorizations, the execution of order forms or statements of work, and similar contract-related actions. As a result, NDUS institutions should very carefully read the terms and conditions and other specific terms which may be attached to any such contract-related actions to determine if a requirement will flow through. Additionally, if the contract or contract-like instrument includes general compliance terms, those terms may be sufficient to flow the compliance requirement through to existing contracts (e.g., “Contractor shall comply with additional requirements related to workplace safety, security, or other regulatory action as required by the government.”).

7. What are the potential consequences for failing to meet the requirements of the Federal Guidance or falsely certifying compliance with the guidance?

The Executive Order and Federal Guidance are silent on the consequences of failure to comply with the Federal Guidance. Potential consequences could include cost disallowance, default termination of the contract or subcontract at issue, and debarment from future federal contracts.

While it is never advisable to falsely certify compliance in any respect related to a contractual requirement, doing so in the federal contracting context could not only result in the termination of any such contract and debarment, but also prosecution under the federal False Claims Act or False Statements Act.

8. Which faculty or staff are subject to the vaccine mandate in the Federal Guidance?

There are two overlapping categories of employee that will be subject to the requirements of the Federal Guidance and Executive Order: all full-time and part-time employees “working on or in connection with a covered contract,” and all full-time and part-time employees working “at a covered contractor workplace.” While this guidance discusses these categories in greater detail below, these phrases are used expansively in the Federal Guidance, so the requirements will extend to many faculty and staff with no connection to a federal contract or contract-like instrument and may affect all employees at some NDUS institutions.

9. What does it mean to work “on” or “in connection with” a covered contract or contract-like instrument?

An employee is working “on” a covered contract if the work the employee performs is called for under the contract or contract-like instrument. However, a contractor employee is also covered if they are working “in connection with a contract,” which means that their work is “necessary to the performance of the contract.” The Federal Guidance notes that this would include employees in ar-

tasks such as “human resources, billing, and legal review.” While NDUS attorneys would not be covered because they are not campus employees, the procurement team, information technology resources, human resources, billing, custodial services, and administration of an institution would also be doing work “in connection with a contract” and would be subject to the requirements of the Federal Guidance.

10. What does it mean to be working in a “covered contractor workplace”?

The Federal Guidance is extremely broad on this point, likely extending the net of the institutions’ obligations to all spaces on campus. The Federal Guidance defines “covered contractor workplace” to mean any location (1) that is “controlled by a covered contractor” and (2) “at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present” during the contract performance period.

As a result, the presence of a single employee who is working “on” or “in connection with” a covered contract, as discussed above, is sufficient to turn the entire workplace into a “covered contractor workplace,” and extends the vaccine requirement to all full-time and part-time employees working or present there. The Federal Guidance takes an extremely broad view of what the workplace includes:

a. What if covered contractor employees only work on one floor, office, or wing of a building?

If an employee working on or in connection with a covered contract works on one discrete part of a building, the entire building is covered by the requirements of the Federal Guidance, unless the contractor can affirmatively show that *no* interactions will take place between the covered contractor employee and a non-covered contractor employee, including in elevators, parking garages, dining areas, restrooms, outdoor spaces, hallways, etc. at any point during the period of contract performance. Practically, this likely means that any building in which a covered contractor employee works will be considered a covered contractor workplace in full.

b. What if covered contractor employees only work in one building or facility on campus?

Similar to the guidance for buildings, the Federal Guidance makes clear that if a covered employee works in one building, site, or facility on a campus controlled by the covered contractor with multiple buildings, sites, or facilities, the entire campus is considered a covered contractor workspace unless the contractor can make the same showing related to buildings, above: that there will be *no* interactions between the covered employees and any non-covered employees during the entire period of contract performance, including in outdoor spaces, lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, wellness facilities, and parking lots and garages. Practically, given that covered employees include administration, human resources, and other employees who are not located in the same workspace or office as the employees working on the grant, the requirements of the Federal Guidance will likely apply to all spaces on campus.

It will likely be challenging or impossible for campuses to with covered contracts performed on campus to apply the requirements to less than the entire campus, due to the difficulty of who covered employees will or will not interact with during the entire term of a contract.

11. How does this affect distant or non-central workplaces, such as the NDSU Ag Extension buildings, the UND Aerospace facility at the Grand Forks Airport, or the UND Family Wellness Centers in Bismarck or Minot?

Provided that no covered employees work at these workplaces, distant or non-central workplaces likely would not be covered by the Federal Guidance's requirements, except for any employees who would travel to the main campus or a covered contractor workplace for meetings or other job duties.⁶

12. How does the Federal Guidance affect 100% remote employees?

The Federal Guidance notes that "an individual working on a covered contract from their residence is a covered contractor employee and must comply with the vaccination requirement for covered contractor employees, even if the employee never works at . . . a covered contractor workplace." This would also apply to remote employees who perform work "in connection with" a federal contract, as discussed above. However, per the terms of the Federal Guidance, because the residence itself is not considered a "covered contractor workplace," "while in the residence the individual need not comply with requirements for covered contractor workplaces, such as masking or social distancing, even while working on a covered contract."

As a result, 100% remote employees who are not working on or in connection with a federal contract would not be required to meet the vaccination requirement, if they are not present on campus during the term of performance of any covered contract.

13. Does the Federal Guidance apply to the employees of vendors or contractors who perform their job duties on campus?

No, although the Federal Guidance strongly encourages covered contractors to "incorporate similar vaccination requirements into their non-covered contracts and agreements with non-covered contractors whose employees perform work at covered contractor workplaces but who do not work on or in connection with a Federal contract, such as those contracts and agreements related to the provision of food services, onsite security, or groundskeeping services at covered contractor workplaces.

⁶ Of course, these facilities could be affected by different federal vaccination requirements, such as the upcoming CMS or Head Start regulations.

14. Is an employee required to be vaccinated under the Federal Guidance who has previously contracted a COVID-19 infection required to be vaccinated?

Yes. The Federal Guidance relies on the CDC's determination that prior COVID-19 infection is not equivalent to vaccination.

15. How should an NDUS institution require employees to demonstrate compliance with the vaccination requirement?

The Federal Guidance requires covered contractors to review employees' vaccination documentation to prove vaccination status. The Federal Guidance permits employers to rely on one of the following documents:

- a. A copy of the record of immunization from a health care provider or pharmacy;
- b. A copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813_R);
- c. A copy of medical records documenting the vaccination;
- d. A copy of immunization records from a public health or state immunization information system; or
- e. Other official documentation verifying vaccination that includes all the following information:
 - i. Vaccine name;
 - ii. Date(s) of administration; and
 - iii. Name of health care or clinical site administering the vaccine.

Digital copies, such as a photograph or a pdf scan, of these records are permissible. There are no specific retention requirements for these documents, but all such records would be exempt from public disclosure pursuant to N.D.C.C. § 44-04-18.1(1). If an employee cannot provide or has lost their vaccine documentation, they should be referred to the vaccine provider site, which should be able to provide them with new cards or replacement documentation about the vaccination they have received.

A recent antibody test is *not* sufficient to demonstrate vaccination status. Similarly, an attestation or sworn document from the employee or the employee's medical provider regarding vaccination status is not sufficient to meet the vaccination requirement.

16. What does the masking and social distancing requirement entail?

Covered contractors must, at all covered contractor workplaces (discussed above), must comply with published CDC guidance for masking and physical distancing. Currently, the CDC guidance is based on community transmission status, as set forth on the [CDC COVID-19 Data Tracker County View website](#).

The CDC guidelines currently require fully vaccinated people to wear a mask in indoor settings, except for certain limited exceptions for identification or where the individual is alone in an

office, in areas of high or substantial community transmission. In areas of low or moderate transmission, fully vaccinated people do not need to wear a mask. Fully vaccinated people do not need to physically distance regardless of the level of transmission.

Individuals who are not fully vaccinated, including visitors and students, must wear a mask indoors and in certain crowded outdoor settings or during outdoor activities that involve sustained close contact with other people who are not fully vaccinated. To the extent practicable, individuals who are not fully vaccinated must always maintain a distance of at least six feet from others, including in offices, conference rooms, and all other communal and workspaces, regardless of masking.

Covered contractors may set guidelines or rules related to mask wearing, but these rules must require individuals who are required to wear a mask under the above provisions to:

- a. Wear appropriate masks consistently and correctly, over both the mouth and nose;
- b. Wear appropriate masks in any common areas or shared workspaces (including open office floorplans, cubicles, and conference rooms).

These policies may provide exceptions to masking that are consistent with CDC guidelines, such as when an individual is alone in a fully-enclosed office with the door closed, for a limited time while eating or drinking and maintaining appropriate distance (for unvaccinated individuals), and for covered contractor employees engaging in activities in which a mask could get wet, high intensity activities which could result in difficulty breathing if mask-wearing were enforced, or activities for which wearing a mask would create a risk to workplace health, safety, or job duty. In the latter case, the institution must engage in a workplace risk assessment in order to determine if an exemption is appropriate.

These requirements must be approved in writing by a duly authorized representative of the institution and enforced.

17. Are exemptions available? How must accommodations be evaluated?

The Federal Guidance provides that employees who have a medical condition or disability which precludes vaccination or a sincerely held religious belief, practice, or observance may receive an accommodation from the vaccination or masking requirement. There is no exemption for a philosophical objection to vaccination or masking.

If an employee requests a medical exemption from either the vaccination requirement or the mask requirement under the Federal Guidance, the institution should treat this request as a reasonable accommodation request under the ADA or Rehabilitation Act. If the disability is not obvious or already known, an institution may ask for information to establish that the condition is a disability and what specific limitations require an accommodation, and request supporting medical documentation. Institutions should then consider what, if any, accommodation it must offer.

If an employee requests an exemption due to a sincerely held religious belief, practice, or observance, the institution should refrain from questioning or interrogating as to the sincerity of the

belief, practice, or observance, and instead evaluate what accommodation may be necessary to meet the request. Best practices for review of religious exemption requests may include appointing a committee to review the requests and removing identifying information from the requests, so the requests for exemption/accommodation may be evaluated fairly and without personal bias.

Institutions may consider whether accommodation of requests is possible, and whether changes to job duties, responsibilities, or work locations may be appropriate to accommodate the request for exemption. One potential accommodation suggested by CDC guidance would include regular, even daily, COVID-19 testing, along with strictly enforced social distancing.

18. Does the vaccination requirement apply to students?

No, with a few exceptions. If a student is working on a covered contract, whether in a paid or unpaid status, the student is considered a covered contractor employee and is subject all related terms. Similarly, if a student is an institution employee in any area that is considered a federal contractor workspace, as discussed above, the student employee is subject to the vaccination requirement as well. This would include ordinary student employees such as cafeteria or bookstore workers, along with teaching assistants, resident assistants and residence hall supervisors, graduate assistants for an athletic team, and similar employees.

The Federal Guidance does not apply to students who are considered “volunteer employees” under state law for the sole purpose of being able to access state fleet vehicles.

If a student is not employed by the campus in one of the above capacities, the student is not subject to the vaccination requirement, but all masking and social distancing requirements would be applicable to students.

19. Does compliance with the vaccination requirement exempt campuses from complying with masking and social distancing requirements?

No. The masking and social distancing requirements of the Federal Guidance extend to all areas which are also covered by the vaccination requirement, but apply not only to employees, but also to visitors to the building (which for NDUS purposes would also include students). In effect, if an area of campus is subject to a vaccination requirement for employees, it must also impose masking and social distancing requirements.

20. Does the Federal Guidance apply if there is a conflicting state, county, or municipal policy or statute?

Yes. The Federal Guidance is promulgated pursuant to federal law and supersede any contrary state or local law or ordinance. Similarly, however, if a state or locality requires more protective workplace safety protocols than those set forth under the Federal Guidance, the Federal Guidance does not excuse noncompliance with those state or local protocols.

21. What other requirements are present in the Federal Guidance?

Covered contractors must designate one or more individuals “to coordinate implementation of and compliance with this Guidance and the workplace safety protocols detailed herein at covered contractor workplaces.” This individual or individuals must ensure “that information on required COVID-19 workplace safety protocols is provided to covered contractor employees and all other individuals likely to be present at covered contractor workplaces,” and “that covered contractor employees comply with the requirements in this guidance related to the showing or provision of proper vaccination documentation.”

22. How does the Federal Guidance affect the NDUS Office?

The NDUS Office should evaluate whether it is performing or administering any covered contracts and follow the above guidance if there is an affirmative determination. Due to the unified nature of the NDUS, however, the NDUS Office should consider whether its employees should be vaccinated prior to any travel to a covered employer workplace, as both NDUS Office employees and institution employees are indirectly employees of the State Board of Higher Education under state law.

Similarly, NDUS Office employees which are located on the campus of a covered contractor, such as the Grand Forks CTS office on the UND campus and certain NDUS Office employees whose offices are located on the campus of Bismarck State College, are potentially covered by the Federal Guidance to the extent their host campus is considered a covered contractor under the Federal Guidance.

23. How does an institution demonstrate compliance?

The Federal Guidance is silent on this aspect, but it is expected that prime contractors will require subcontractors to certify compliance in writing, and the contracting federal agency will likely do the same.

24. What about the OSHA, CMS, and Head Start mandates?

The OSHA vaccine requirement applies only to certain states and private employers with over 100 employees. It does not affect North Dakota state agencies or institutions.

The CMS and Head Start mandates were announced on September 9, 2021. However, both CMS and HHS (respectively) have announced their intent to issue Interim Final Rules, which have yet to be published. Based on information from industry groups, we expect the CMS mandate to affect all hospitals, clinics, and clinical settings which receive Medicare or Medicaid funding. This will include the UND SMHS and its satellite facilities, such as the Family Wellness Centers in Bismarck and Minot. It is unclear at this time whether it will include student health centers at institutions, but indications are that it will extend to those facilities if Medicaid or Medicare payments are accepted. Additionally, it appears that the requirements will, like the Federal Guidance, apply well beyond the

scope of the employees who are directly involved in providing services to Medicare or Medicaid payments or related activities.

Similarly, the Head Start mandate is expected to apply to all employees and program staff at Head Start facilities and may extend further. While there has been no Interim Final Rule issued, a letter from the Head Start administrator indicated that the compliance date will be January 1, 2022.